FILE COPY

Supreme Court, U. S.
FILED
NOV 16 1972
MICHAEL RODAK, JR., CLERK

in the

Supreme Court

of the

United States

OCTOBER TERM, 1972

NO. 72-701

JOHN DAVID LINDSTROM,

Petitioner,

vs.

UNITED STATES OF AMERCIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MAX P. ENGEL
Attorney for Petitioner
1461 N.W. 17th Avenue
Miami, Florida 33125

DAVID B. JAVITS
Of Counsel

MIAMI REVIEW — 371-4853 — 377-3721

INDEX

	Page
OPINIONS OF THE COURT BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
RULE INVOLVED	2
STATEMENT OF THE CASE	3-4
ARGUMENT FOR ALLOWANCE OF WRIT	5-10
CONCLUSION	11
CERTIFICATE OF SERVICE	12
APPENDIX A	App. 1
APPENDIX B	App. 3
APPENDIX C	App. 5

TABLE OF CASES

Case	Page
Greene v. United States, 454 F.2d 783 (9th Cir., 1971	6, 7
Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed. 848 (1958)	5, 6, 8
Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1930)	5, 6

In the Supreme Court of the United States

OCTOBER TERM, 1972

NO. _____

JOHN DAVID LINDSTROM,

Petitioner,

vs.

UNITED STATES OF AMERCIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS OF THE COURT BELOW

The Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit entered on September 25, 1972, is unreported. A copy is attached as Appendix "A".

A Petition for Rehearing was denied without opinion on October 17, 1972.

JURISDICTION

The jurisdiction of this court is invoked under the provisions of 28 U.S.C., §1254(1).

QUESTIONS PRESENTED

I

WHERE THE EVIDENCE AT TRIAL CLEARLY SHOWS THAT DEFENDANT ACTING ON BEHALF OF A GOVERNMENT AGENT INTRODUCED THE AGENT TO ONE WHO WAS IN POSSESSION OF STOLEN MONEY ORDERS AND TOOK NO FURTHER PART IN THE CRIMINAL ACTIVITY IS THE DEFENSE OF ENTRAPMENT AS A MATTER OF LAW ESTABLISHED IN A NON-JURY TRIAL?

II

IS LOCAL RULE 18 OF THE FIFTH CIRCUIT VIOLATIVE OF DUE PROCESS AND THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL?

RULE INVOLVED

LOCAL RULE 18, UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

SUMMARY CALENDAR

(a) Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar.

(b) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary calendar by the clerk, pursuant to directions from the court.

(c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar.

STATEMENT OF THE CASE

Petitioner and a co-defendant were indicted on January 27, 1972, for violation of 18 U.S.C., §641-2, to-wit: that they did unlawfully receive, conceal and retain, with intent to convert to their own use and gain, 79 United States Postal Money Orders, with knowledge that the said money orders had been stolen.

A hearing on the Lindstrom's Motion to Suppress was held on May 8, 1972, and May 10, 1972, at the conclusion of which the Motion to Suppress was denied. Upon stipulation of counsel that the testimony at trial would be identical to the testimony on the motion, the court found defendant guilty and placed him on probation for a period of one year.

Petitioner and Fred Smith, a professional police informant with the Dade County, Florida, Public Safety Department, had a chance meeting on January 11, 1972. Smith offered to sell Petitioner thirty dollars worth of food stamps (presumably stolen or counterfeit) for fifteen dollars, which Petitioner refused.

Smith asked the Petitioner if he had anything going, to which Petitioner responded, he did not. However, upon repeated questioning, Petitioner stated that he had heard of someone who had one hundred thousand dollars' worth of money orders or Traveler's Checks. Mr. Smith was interested in these money orders and said that he knew where he could sell them and it would be something they would both make money on. Petitioner told Smith he would be in touch with him.

Petitioner did not get in touch with Smith. Sometime later the two persons had an occasion to meet again by chance and Petitioner told Smith he was still not sure about the whole matter. Smith told Petitioner that he had already sold the money orders and wanted to see that Petitioner received two hundred dollars out of it.

Petitioner testified that Smith contacted him seven or eight times about getting the money orders and the fact that Smith would see to it that he got two hundred dollars out of the deal. Smith told Petitioner on the telephone that he should set up a meeting because Smith had a buyer.

Petitioner testified that he had never met Pacetti before the evening of January 18, 1972. Petitioner met Pacetti through a mutual friend. Pacetti had possession of the money orders at all times except when Pacetti gave Smith a sample to show his buyer.

The buyer was a Sergeant Watts who paid Pacetti for the money orders and ultimately arrested Pacetti and the Petitioner when the money orders were delivered to him. Petitioner was paid one hundred dollars by Pacetti.

ARGUMENT FOR ALLOWANCE OF WRIT

1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AS TO THE APPLICATION OF ENTRAPMENT AS A MATTER OF LAW.

The two landmark cases in the field of entrapment are **Sorrells v. United States,** 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932) and **Sherman v. United States,** 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958).

In **Sherman,** supra, this court said:

> "The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime," p. 371.

In **Sherman,** supra, the defendant and a government informant were both patients of the same doctor for treatment of narcotics addiction. The informant repeatedly urged Sherman to get him some narcotics. Finally, Sherman obtained a small quantity which they divided between them. This Honorable Court reversed the conviction finding entrapment as a matter of law.

In the case at bar the Petitioner, a man with no prior criminal background, after persistent questioning by the informant revealed that he had heard of someone who had stolen money orders. At this point Petitioner had never even met Pacetti, the man with the money orders.

After repeated telephone calls and offers of money by the informant, Petitioner finally arranged the meeting, which was attended by several police officers posing as buyers and a federal officer, in addition to the informer, Pacetti and the Petitioner.

In **Sherman**, supra, this court held that the defense of entrapment is established as a matter of law in a prosecution for unlawful sale of narcotics where the undisputed testimony of the prosecution's witness shows that these sales, made to a government informer, were brought about by the informer's persistent solicitation in the face of obvious reluctance on the part of the defendant.

In **Sorrells v. United States**, the court held that:

> "Entrapment is established when the criminal design originates with the officials of the government and they implant in the mind of an innocent person the predisposition to commit the alleged offense and induce its commission in order that they may prosecute."

The Court of Appeals for the Fifth Circuit has not applied these standards in the case at bar because the facts in the case at bar fall clearly within the requirements of **Sherman** and **Sorrells.**

Another possibility exists as recognized by the Ninth Circuit Court of Appeals in the case of **Greene v. United States**, 454 F.2d 783 (9th Cir. 1971), where the court found that something similar to entrapment and just as improper, if not worse, took place.

In the **Greene** case, the court reversed the moonshining and bootlegging convictions of both defendants, who could not, strictly speaking, bring themselves within the defense of entrapment because they did have a predisposition to sell illicit liquor. The revenue agent went about his job so aggressively that he persuaded the defendants to start production again, made available a still, an operator and containers, and at one time was supplying sugar wholesale. In that case, even though the defendants had a latent criminal intent, in the absence of any overt acts the government agent, in putting them in business for the sole purpose of arresting them, was guilty of creative activity. The Ninth Circuit in **Greene** held that creative activity gives rise to the same underlying objections which render entrapment repugnant to American criminal justice.

> "Entrapment is shown where government agents go beyond mere affording of opportunity or facilities for commission of an offense and exert persuasion or pressure of one kind or another which induces the commission of a crime by one who had no predisposition to do so." **Greene v. United States.** page 786.

While the defense of entrapment could certainly not be applied to the co-defendant, Pacetti, since he had the contraband articles in his possession and was apparently waiting for a customer to come along, entrapment, in the classic sense, applies to the Petitioner who merely mentioned that he had heard of a person who had the money orders, and was carried the rest of the way through the persistence and offers of money by the government agent.

There is nothing particularly wrong with the procedure employed by the police in this case in locating the stolen money orders since the Petitioner did in fact lead the authorities to the person who had the money orders. However, to prosecute the Petitioner after involving him in the plot is immoral and an abuse of police powers as this court said in **Sherman v. United States.**

> "Thus, the government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted. Law enforcement does not require methods such as this."

The holding in the case at bar conflicts with these prior decisions of the United States Supreme Court and therefore, a Writ of Certiorari should be granted to review the judgment of the Court of Appeals.

2. LOCAL RULE 18 OF THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, OPERATES AS A DENIAL OF DUE PROCESS AND A DENIAL OF THE EFFECTIVE ASSISTANCE OF COUNSEL.

The court's jurisdiction is invoked first, as to its supervisory powers over procedures of inferior courts and, second, because the procedure in question as implemented operates to deny criminal defendants of certain basic constitutional rights.

The transfer of this cause to the summary calendar constitutes a denial of Petitioner's constitutional right of procedural due process as guaranteed by the Fifth Amendment to the United States Constitution.

> "Rule 34 of the Federal Rules of Appellate Procedure provides that the clerk shall advise all parties of the time and place at which oral argument will be heard."

The local rule abrogates Rule 34 which was promulgated by this Honorable Court. Under the guise of weeding out frivolous appeals, the Court of Appeals is able to eliminate oral argument in many criminal appeals which representatives of the Court feel do not merit the full consideration envisioned by defendant's right to appeal.

It is the contention of Petitioner herein that this procedure operates as a denial of his right to appeal which is an element of due process because the case considered on the briefs alone does not give an appealing party the full benefit and the full consideration that he would have if his attorney was present in court and able to argue the strongest points and rebut the argument of opposing counsel.

An appeal, unlike certiorari, is a matter of right and every defendant should be entitled to the full benefit of this right, which would include oral argument. An appealing party is also denied effective assistance of counsel in that the oral argument is an essential step in the appellate process and, the impairment of this right of counsel to make oral presentation seriously diminishes the chances for a favorable determination of the appeal.

The delegation of a decision as to which cases merit oral argument in effect is a predetermination of which appeals will be denied prior to a full consideration of all the merits of the cases by the panel of judges assigned to

decide the appeal. The very fact that certain appeals are singled out for less than the full measure of due process permitted for other appeals in itself is a denial of defendant's right to appeal.

The situation is analogous to one where, upon hearing testimony of government's witnesses, a trial judge decides that a defendant is obviously guilty and directs a verdict of guilty.

Such a procedure is repugnant to our entire system of justice and should be corrected by this court to insure that every defendant in every criminal case has the full measure of due process before the prison door is locked behind him.

CONCLUSION

For the foregoing reasons, it is submitted that this Petition for Writ of Certiorari should be granted.

DATED at Miami, Florida, this ____ day of November, 1972.

Respectfully submitted,

MAX P. ENGEL
Attorney for Petitioner
1461 N.W. 17th Avenue
Miami, Florida 33125
Telephone (305) 633-9743

DAVID B. JAVITS
Of Counsel

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Petition for Writ of Certiorari has been mailed this ____ day of November, 1972, to the Hon. Robert Rust, United States Attorney, Ainsley Building, Miami, Florida.

MAX P. ENGEL

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-2106

Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHN DAVID LINDSTROM,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(September 25, 1972)

Before THORNBERRY, COLEMAN and INGRAHAM,
Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1] [2]

---

*Rule 18, 5 Cir.; see Isbel Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

[1]See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

[2]See Eisenhardt v. U.S., 5th Cir. 1969, 406 F.2d 449 (entrapment); Pierce v. U.S., 5th Cir. 1969, 414 F.2d 163 (creative activity by government).

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk

Edward W. Wadsworth
Clerk

Room 408-400 Royal St.
New Orleans, La. 70130

September 15, 1972

TO COUNSEL OR PARTIES LISTED BELOW:

No. S72-2106—U.S.A. vs. John David Lindstrom

Gentlemen:

You are hereby notified that a panel of this court, after due consideration and pursuant to Local Rule 18, has transferred the referenced case to the Summary Calendar for disposition.

Local Rule 18 states: "(a) Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar. (b) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary calendar by the Clerk, pursuant to directions from the court. (c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar."

Yours sincerely,

EDWARD W. WADSWORTH,
Clerk

By /s/Carol A. Gaudet
Deputy Clerk

/cg
cc Mr. Max P. Engel
Mr. Robert W. Rust
Mr. Charles O. Farrar, Jr.

APPENDIX C

FRED SMITH,

was called as a witness by the defendant, and having been previously been sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ENGEL:

Q Mr. Smith, will you state your name, address in the record, please.

[60] A Fred Smith, 13415 31st Avenue.

Q What type of work are you engaged in?

A Carpenter.

Q Do you know a Mr. Lindstrom?

A Yes.

Q What period of time have you known him?

A For the past seven or eight months.

Q Mr. Smith, do you have a criminal record?

A Yes.

Q Can you tell me how far back it goes, please, sir?

MR. SULLIVAN:

Your Honor, that's not proper inquiry for purposes of credibility.

MR. ENGEL:

Yes it is, because based upon the testimony of people before the Court, it's either credible or not credible, based upon their saying that he was reliable, and under certain circumstances, this tests his credibility.

THE COURT:

But this, of course, is your witness at this point on the motion.

MR. ENGEL:

Actually, he is my [61] witness, because the Government actually should have put him on. I could ask the Court to declare him the Court's witness for the purpose of the testimony.

THE COURT:

This is true, but it is his credibility—you're hoping to elicit from him certain information—

MR. ENGEL:

No, I just want to test it to see if what they have told me will fall in line, so that Your Honor's thinking will be just along the line that has been brought out. I am not asking for a particular crime. I am just asking what length of time it was; then I have another question. You could strike it, if you feel it is not material.

THE COURT:

All right.

BY MR. ENGEL:

Q What length of time does your record go back, please?
A '67.

Q For about three years, four years?
A (Nods head.)

Q Do you know a Sergeant Watts?
A Yes.

(62) Q How long have you known him?
A Several years.

Q During that period of time that you have known Sergeant Watts, did you work for him and his department?
A Yes.

Q And what length of time did you work for his department?
A Several years.

Q In what capacity?
A As an informant.

Q Were there times that you got paid for the work or the information that you furnished his department?
A Yes.

Q Now, were there times that Sergeant Watts went into Court and made certain recommendations to the judge, or judge of state court concerning you in various criminal cases?

A No.

Q He never did that for you?

A No, sir.

Q All right, sir, now, did there come a time around January 11, 1972, when you had [63] occasion to see Mr. Lindstrom on or about that date?

A Yes.

Q And could you tell me where that was, please, sir.

A A gun shop on Northwest 7th Avenue.

Q I did not hear you.

A A gun shop on Northwest 7th Avenue.

Q And was that during the day or during the evening?

A During the day.

Q Did you have any conversation with Mr. Lindstrom at that time?

A Yes.

Q What did he say to you or what did you say to him as best you remember?

A He mentioned that a friend of his had $100,000 in Traveler's checks.

Q You mean, he just came right out and said, "A friend of mine has $100,000 worth of Traveler's checks," just like that?

A There was conversation before that time.

Q As a matter of fact, the prior [64] conversation was, "You got anything going," or "Do you know where I could get anything going?"

Was there not some type of conversation of that nature?

A Yes.

Q And then he said, "Well, a friend of mine has $100,000 worth of money orders," or "Traveler's checks," whatever the case may be; is that correct?

A Yes.

Q At that time you were still helping the Sheriff's Department, Sergeant Watts, were you not?

A Right.

Q And did you tell Mr. Lindstrom that you were interested in the $100,000 worth of Traveler's Checks or whatever the case may be?

A Yes, I did.

Q Did you tell him to contact the person or persons that had possession of these items, because of your interest in them?

A Yes, I did.

Q And did Mr. Lindstrom tell you that he personally did not have them and did not know the [65] person that had possession of them; he had to get in touch with him there, some second or third party?

MR. SULLIVAN:

I realize leading questions may be asked of a hostile witness, but I do object to the testimony by the defense attorney.

MR. ENGEL:

I will withdraw the question.

BY MR. ENGEL:

Q What was the information that Mr. Lindstrom told you he had to go through to contact this person, if you remember?
A I don't recall exactly what he had to go through, but he did say they were not his.

Q Did he tell you he had to contact some other person to obtain these items, or have them obtained to you?
A Yes.

Q Now, after receiving this information, did you contact Sergeant Watts?
A Yes, I did.

Q Was that the same day?
A I believe it was that evening.

Q Did you contact him by phone or personally?
[66] A Personally.

Q Did you go to his office?
A Yes.

Q Did he tell you to follow this up?
A Yes, he did.

Q Was there a conversation of that nature or subject?
A Yes.

Q Did he tell you to set up a meeting place at a later time so you could look at them and to bring him samples of the merchandise, so to speak.
A If there were any available.

Q If there were any available. Assuming they were available, did he tell you the things I have asked you about?
A Yes.

Q As a result of seeing Sergeant Watts and having this conversation, did you then contact Mr. Lindstrom?
A Yes, sir, I did.

Q Did you tell Mr. Lindstrom, "Look, I am interested in these items. How about setting [67] up an appointment so I could look at them or get a sample of them," or something of that nature; please, sir?
A Yes.

Q Did Mr. Lindstrom tell you in essence that he would see what he could do?
A That's right.

Q As a matter of fact, he was unable to do anything, and you contacted him at least two times by phone, did you not, prior to any meetings being set up?
A He said it would take about a week or so before anything would be able to follow through.

Q Did you contact him again after you initially contacted him after seeing Sergeant Watts?

A I talked to him several different times.

Q In each one of these several conversations that you had, did you again impress upon him the fact that you were interested in these items, that he should do what he could to get them for you?

A I just asked if he had heard anything [68] about them.

Q Do you remember telling Mr. Lindstrom, sir, that it would be worth his while if he would get these things for you, or help you get these things, words to that effect?

A I told him it was something we both could make money on.

Q Now, did there come a time when Mr. Lindstrom said that he was able to contact a particular person?

A I don't remember.

Q Did there come a time, sir, when he said these items were going to be available?

A Yes.

Q Was that on January the 17th or 18th, as best you remember?

A I'd say the 17th.

Q As a result of getting that information, you contacted Sergeant Watts?

A Right.

Q Did Sergeant Watts tell you to get a couple of samples of the items and bring them to him?
A Right.

[69] Q Did he tell you to try to have this meeting in a certain place?
A No.

Q Did you, as a matter of fact, tell Mr. Lindstrom that you needed samples of these items?
A I did.

Q Did you meet a Mr. Pacetti on the 17th or the 18th?
A The 18th.

Q And to your knowledge, had Mr. Lindstrom ever known Mr. Pacetti prior to this meeting, if you know?
A Not that I know of.

Q Did Mr. Pacetti give you one or two of these money orders or whatever they were?
A No.

Q Did you get a sample of the money orders?
A Yes.

Q Did you take these money orders to Sergeant Watts?
A I did.

Q What time did you get the money orders, [70] if you would, please?
A Eight o'clock in the evening.

Q And did you take them to Sergeant Watts that evening?

A I did.

Q Did you set up a place to meet to get the balance of them?

A That was already prearranged.

Q Did you help in the selection of where the place should be?

A No.

Q And where was it prearranged?

A At Rogers Tavern, which is two doors away from the gun shop.

Q Now, as a result of seeing Sergeant Watts, were you told to go back to this place?

A I was.

Q Were you told to bring certain amounts of money back with you?

A No, I was to take Sergeant Watts back with me.

Q Did you take Sergeant Watts back with you?

A I did.

[71] Q Did he make a phone call from his office while you were there to Postal Inspector by the name of Hawkins?

A He did make a phone call. I don't know who it was to.

Q Now, did you have a prearranged signal with the other people, Sergeant Barr and Mr. Hawkins, that when the transaction was completed that you waived a hand or something of that nature to advise them of the transaction being completed?

A I was not aware of it.

Q You were aware, though, that after eight o'clock, after you presented—was it one or two items?

A Two.

Q You presented two items to Sergeant Watts?

A No, just one. I'm sorry.

Q Were you given one or two?

A Two.

Q Why did you only present one rather than two?

A Well, I left one in the front seat of my car.

[72] Q Was it confirmed in your presence that the item you were talking about actually was a stolen item?

A Yes.

Q So, Sergeant Watts told you it was stolen, is that correct?

A Yes.

Q And he knew at ten o'clock that the item was stolen, did he not?

A Yes.

Q And he had possession of one of these stolen items, did he not?

A Yes.

Q When he went in the back of the bar at ten o'clock on that evening, you pointed out to Sergeant Watts the two individuals involved, did you not?

A I introduced him to Mr. Lindstrom.

Q But you had told him that these would be the two individuals that are involved, isn't it so?

A Right.

Q Knowing that, and knowing what Sergeant Watts had told you, did Sergeant Watts [73] immediately take these people and say, "Look you're under arrest," and read them their Miranda rights at that point?

A No.

Q But the focus of investigation had pointed to Mr. Lindstrom and Mr. Pacetti, based upon what you told the Sergeant and based upon his conversation confirming the items were stolen; isn't that so?

A Yes.

Q Now, sir, after that, did Sergeant Watts go into some type of question and answer situation with Mr. Lindstrom and Mr. Pacetti?

A Not that I remember. There was conversation, but I was not aware of what it was.

Q Well, as a result of the conversation he had, he went ahead and told them that he was interested in the purchase of these items; right?

A Yes.

Q And he went ahead and set up the transfer by going in a car and speaking to them while they were riding around; isn't that so?

A Right.

Q And it was after the transfer took [74] place—and the money did change hands; did it not?

A Correct.

Q Mr. Pacetti got the money in his hands?

A Right.

Q And Mr. Pacetti, did he, in your presence, give Mr. Lindstrom $100?

A Yes.

Q Do you remember Mr. Lindstrom, after receiving the $100 and prior to being placed under arrest, asking you the question, "Well, where is the money you are supposed to give me, where is it"?

Do you remember that type of question being asked of you?

A No.

Q But you had said and stated prior that he was to get something from you for aiding in this particular transaction; didn't you state that to the Court?

A Long before this took place.

MR. ENGEL: No further questions. Thank you, Your Honor.

* * *

THEREUPON:

JOHN LINDSTROM

was called as a witness on his own behalf, and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ENGEL:

Q Mr. Lindstrom, state your name, address, please, sir.

A John Lindstrom, 1791145 Northwest 84th Avenue.

A At the time that this matter happened, just prior to that occasion, by whom were you employed?

A Southern Bell Telephone Company.

[84] Q How long had you worked for them?

A Six years.

Q Are you married?

A Yes.

Q Do you have any children?

A Two.

Q Have you ever been arrested and convicted of a criminal activity prior to this situation of the arrest?

A No, sir.

Q Were you in the service?

A Yes, sir.

Q What type of discharge did you get?
A Honorable.

Q Now, did there come a time around January 11, 1972, when you saw Mr. Joe Smith in a gunshop?
A Yes.

Q Briefly, if you can, tell us what happened between you and he and in the way of conversation.
A Well, Smith and I had met off and on for a period of seven months.

We talked, you know, and as I recall (85) it, that particular day, we walked outside and we were talking, and in fact, he brought out some Federal ration stamps to start the conversation with, and he offered me to buy $30 worth of them for $15, which I declined.

Then he asked me what I had going, and, you know, I said, "Nothing."

We talked on a few more minutes, and again, you know, he mentioned, you know, if I had anything going, and I thought back to these money orders, and I said, "Well, I might be able to get a hold of some postal money orders. I know someone who might have some."

Q Did you personally have them?
A No, sir.

Q And where had you heard about them?
A I had heard from them in a bar.

Q As a result of this conversation, what did Mr. Smith say to you?

A Well, he said that he was interested in them, and he knew that he could sell them, and that there was something that both we could both make money on, it would be something interesting.

Q Then what happened?

A Well, then, what happened is: I told him I would see what I could do and get in touch with him.

Q What happened after that?

A Well, after that, I ran into him again over there, and I told him I still was not sure.

Then he said he already had them sold.

We talked, you know, price, a couple of times, and he said that he wanted me to get $200 out of it.

Q Then what happened?

A Well, I went ahead and arranged for the meeting at his insistence and the whole chain of events that took place.

Q Now, prior to his telling you you were going to get some money and things of that nature, did you have any intent or predisposition to get these money orders to sell?

A No, sir. I only met the possessor, Mr. Pacetti, about two hours before we were arrested.

Q So, you never had possession of these money orders?

[87] A No, sir.

Q Now, how many times would you say Mr. Smith contacted you concerning these items before January 18, 1972?

A You mean from the time I told him that I might be able to until the time we were arrested?

Q Yes, just approximately.

A I'd say seven or eight time we met.

Q Was his conversation always either directly or indirectly about you getting these items and you could make some money?

A Yes. Sometimes it would talk about another matter, but it would get back to—the main stage of the conversation would be the money orders.

Q Then, on January 17, did you have occasion to speak to a Mr. Smith or he speak to you?

A January 17, yes.

Q Could you tell us briefly what the tenor of that conversation was?

A Well, we were talking over the phone, and I told him that I could, indeed could, and—that what he wanted me to do—and he said to set up [88] a meeting, so it was agreed that we would meet at Rogers Tavern.

And I already—the other fellow and I had talked, and I arranged to meet him at the Hideaway at 7:30, and I was supposed to meet Smith st Rogers Tavern at 8:30.

Q Did you, as a matter of fact, meet with Mr. Pacetti prior to eight or 8:30 that evening?

A I met him at 7:30.

Q Had you ever known him from any prior occasion?
A I never met the man before in my life.

Q How were you introduced to him?
A Through a mutual friend.

Q Did you have possession of the money orders at that time?
A No, sir.

Q Who had possession of them?
A Mr. Pacetti had them. Up until everything was under way, I thought they were American Express.

Q Now, at around eight o'clock or 8:30 or nine that evening, did you have a call from (89) Mr. Smith at Rogers Tavern?
A Yes.

Q And did he come by to pick up some samples?
A Yes. When Pacetti and I arrived, he was at the bar drinking beer, and we talked for a minute, and Pacetti and myself were shooting pool, and we gave Smith a sample. He took it with him, and he left and he said he was going to raise the money, and then about fifteen minutes, he called back and he said—well, I say fifteen minutes—it might have been longer—he called back and said that they looked all right and that the man was looking at them now and he was having a little trouble getting up the money, so we said, "Just hang on and we will let you know."

And then, approximately another twenty or thirty minutes or so, he called back again and he said that he

had the money, that he was on the way, and the barmaid relayed this information to me. I did not talk to him the second time.

Q Did there come a time when Mr. Smith arrived at the bar with another individual?
[90] A Yes.

Q What happened at that point?
A Well, he introduced him to me as McDuffey, I believe the name was, and he said he inferred that he was going—he had the money.

Q Now, this person that he introduced as McDuffey, did he, at that time, tell you or Mr. Pacetti you were under arrest for anything?
A No, sir, he did not.

Q Did he at that point advise you of your Miranda rights?
A No, sir.

Q By that, I mean, did he advise you that you had a right to an attorney, right to keep silent, the right that if you don't have the money they will get you an attorney, things of that nature?
A No, sir.

Q Did he then tell you and Mr. Pacetti he wanted to leave the bar and take a ride around and look at the items?
A Yes, sir. We all agreed that we, you know, once we had the money, we would get in the car and look at them.

Q And did Mr. Pacetti bring the money (91) orders out of the trunk and give them to him?

A Yes.

Q And did you all take a ride around?

A Yes, sir.

Q At a later time did you come back to the bar?

A Yes, sir, I guess the ride lasted ten minutes, all of it.

Q At that time, did some money pass hands from this fellow, McDuffey or Mr. Watts, or whatever his name was, to Mr. Pacetti?

A Well, the money was passed hands, but if I remember correctly, Smith had part of the money, and McDuffey, at that time, had the rest.

Q But did the money ultimately go to Pacetti?

A Yes.

Q And when Mr. Pacetti got the money, did he give you any of it?

A Yes, he handed me $100, and I looked at it, and I said to Smith, "Wait a minute, where is the other $100," and by that time the police came, stuck their pistols in the window, and shouted out obscenities and told us not to move that (92) they would blow our heads off, like that.

Q Now, could you tell me the reason that you got involved in this particular episode or this particular problem?

A The only reason I ever met Mr. Pacetti was at Joe Smith's insistence.

Q And why did you meet Mr. Pacetti at Joe Smith's insistence?

A Well, I have know Smith for some time, and he seemed like a pretty nice person, and then at the—after I mentioned to him that I might, he offered me money.

Q Did you have any prior thought in your mind ever to get these money orders or whatever they were for the sale?

A No, sir.

Q Would you say that you were induced to do this by the money that Mr. Smith offered you initially?

A Yes.

MR. ENGEL: I have no further questions. Your witness.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-731

JOHN DAVID LINDSTROM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner and a co-defendant were indicted for receiving and selling 79 stolen United States postal money orders in violation of 18 U.S.C. 641. After a hearing on a pre-trial motion to suppress held in the United States District Court for the Southern District of Florida, the motion was denied. Upon petitioner's request that the jury trial be waived and his stipulation that the testimony adduced at the hearing would be identical to the testimony at trial, the court found him guilty as charged and placed him on probation for a period of one year. The court of appeals affirmed *per curiam* without opinion (Pet. App. 1).

The evidence showed that petitioner and Fred

Smith, an informant, met by chance at a gun shop on January 11, 1972 (Tr. 62–63). The two men had known each other for several months (Tr. 60). During the course of their conversation Smith inquired whether petitioner had "anything going" (Tr. 64). Petitioner replied that he knew of someone who had $100,000 in American Express traveler's checks (Tr. 64, 94).[1] At that time petitioner was under the mistaken belief that the stolen property consisted of traveler's checks rather than United States postal money orders (Tr. 94). Expressing an interest in a possible transaction, Smith requested that petitioner get in touch with the possessor of the goods (Tr. 64, 65).

Petitioner's own testimony revealed that he had learned of the stolen merchandise from his brother-in-law at least one week before seeing Smith on January 11. Petitioner had heard his brother-in-law mention someone who had $10,000 worth of stolen money orders. The record reflects the following testimony of petitioner on this matter (Tr. 97–98):

> Q: Did you inquire about that to [your brother-in-law]?
>
> A: Well, no. He told me to remember a phone number, which I did.
>
> Q: Why did he ask you to do that?
>
> A: Well, he figured if I was interested in it, it probably was my business.
>
> * * * * *

[1] Petitioner's account of that conversation indicated that when asked if he had "anything going," his response was: "At first, I answered, 'No.' We talked for a few more minutes, and I said, 'I might be able to get a hold of $10,000 worth of American Express money orders, but I am not sure' " (Tr. 94).

Q: Did you ever call the number?
A: Yes.
Q: When?
A: Oh, a short time later.
Q: This is approximately a week or two before having this conversation with Joe Smith?
A: I would imagine it was a week.

Petitioner wrote down the telephone number of the suggested contact for future reference (Tr. 99, 100). It was through this connection that the money orders were eventually obtained (Tr. 100).

On the evening of January 11, the date of the initial encounter at the gun shop, Smith visited the office of Sergeant Watts of the county narcotics department and, after relating his earlier conversation with petitioner, was told to arrange a meeting and bring back some sample checks for Watts' inspection (Tr. 13, 65, 66). Smith asked petitioner about making further arrangements; petitioner answered that he would see what could be done (Tr. 67). During the next week Smith had several more talks with petitioner to find out if there were any new developments and told him that they could both make money by consummating the deal (Tr. 67, 68). Petitioner never indicated a desire to abandon the scheme; nor did Smith ever coerce him into cooperation (Tr. 76, 77).

On January 17, 1972, after hearing from petitioner that the goods would soon be available, Smith again communicated with Sergeant Watts, who told him to get some samples and deliver them to his office (Tr. 68, 69). Smith met with petitioner and a Mr. Pacetti

on the evening of January 18, 1972[2] and carried out Watts' instructions (Tr. 69, 70). A sample item obtained from Pacetti and later delivered to Watts established that the stolen property was actually United States postal money orders (Tr. 14, 22, 103). Smith made a telephone call from Watts' office to Rogers Tavern and instructed petitioner and Pacetti to continue waiting for him there while he collected money for payment (Tr. 17, 18).

Later that evening Smith and Watts joined petitioner and Pacetti at the tavern, which petitioner had designated as the place where the rest of the checks would be transferred to the purchasers (Tr. 70, 77). Watts—pretending to be Smith's accomplice—expressed a desire to buy the stolen goods (Tr. 73). Watts advised petitioner that he only had $600 but that someone was bringing him an extra $400 (Tr. 22). Petitioner said, "Okay, no problems. As soon as you get the money, let me know, and then we will have to get the items" (Tr. 22). Shortly thereafter a detective working in an undercover capacity arrived with the cash (Tr. 44), and petitioner retrieved from the trunk of a car a sack containing the rest of the stolen money orders (Tr. 24–26, 77). The transaction was finally completed inside of the automobile, which petitioner was driving (Tr. 25, 44). Pacetti received the pay-off money and handed petitioner $100 (Tr. 34, 46, 74). At a designated spot near the tavern Watts signalled from within the car to a group of officers who moved in for the arrest.

---

[2] Petitioner and Pacetti had never met each other personally until that night (Tr. 88).

1. Petitioner contends that the evidence established the defense of entrapment as a matter of law. Viewed in the light most favorable to the government, the evidence that the jury was entitled to credit fails to support this contention.

As this Court pointed out in *Sherman* v. *United States*, 356 U.S. 369, 372, "the fact that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the creative activity' of law-enforcement officials," citing *Sorrells* v. *United States*, 287 U.S. 435, 441, 451. The principal limitation on government activity is that its officials not "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Sorrells, supra*, 287 U.S. at 442. In the instant case the trier of fact heard ample evidence of petitioner's "predisposition" to commit the crime. Even before the government informant appeared on the scene, petitioner had shown a keen interest in learning how to reach the eventual supplier of stolen money orders. When asked in general whether he had "anything going," petitioner freely volunteered information about a specific supply of stolen goods and, after a promise of remuneration, helped make arrangements for the sale. In short, petitioner was a willing and active participant who was largely responsible for setting this scheme in motion. Accordingly, the suggestion that petitioner was not "predisposed" to commit the offense has no support in the record of this

case. See *Osborn* v. *United States*, 385 U.S. 323, 331–332.[3]

We note that the government has recently sought review of three decisions by courts of appeals involving entrapment issues. These decisions (*United States* v. *Russell*, 459 F. 2d 671 (C.A. 9), certiorari granted October 16, 1972, No. 71–1585; *United States* v. *McGrath*, No. 71–1791 (C.A. 7), petition for certiorari pending, No. 72–761, and *United States* v. *Knight*, No. 72–965, petition for certiorari filed January 8, 1973) raise substantially different problems from the instant case, and the facts in this case do not complement those cases in a way that would invite collective consideration.

The issue in *McGrath*, *Russell* and *Knight* is whether the defense of entrapment may be asserted by one who was predisposed to commit the offense on the ground that the degree of governmental participation in the illicit enterprise is an independent and con-

[3] Relying on *Greene* v. *United States*, 454 F. 2d 783 (C.A. 9), petitioner seemingly argues that even if resort to the entrapment defense is precluded by criminal predisposition, a similar doctrine—that of "creative activity" by government agents—requires a reversal of the conviction (Pet. 6–7). While we believe *Greene* to conflict with the entrapment decisions of this Court, since the defendants there had a prior disposition to commit the offense, the case does not support petitioner's position since it is factually distinguishable from his case. In *Greene* government involvement included the construction of an illegal still and its operation over a prolonged period of time, all accompanied by government inducement and veiled threats of physical injury. *Greene* involved a degree of government activity far more "intense and aggressive" than that present here (454 F. 2d at 787).

trolling criterion.[4] The instant case involves no such additional consideration; it involves solely the classic issue of predisposition. Indeed, the central issue here—whether predisposition has been shown on this evidence—is merely factual, and does not warrant further review.

2. Petitioner also contends that he was denied procedural due process and deprived of the effective assistance of counsel by the operation of the Fifth Circuit's Local Rule 18, which allows a transfer of

---

[4] All three cases involve far more extensive governmental involvement than petitioner's case. In *McGrath* government agents infiltrated a complicated scheme to print counterfeit bills and participated in its implementation. Particularly offensive to the court of appeals was the fact that agents manufactured the money, delivered it, and then arrested the recipient for possession of contraband. In *Russell* an undercover agent proposed an arrangement whereby the defendant and his accomplices, already suspected of dealing in methamphetamines, would produce methamphetamine and the agent would supply a chemical ingredient without which the drugs could not be produced. The court of appeals sustained the defense of entrapment principally because of its conclusion that the chemical ingredient supplied by the undercover agent was virtually unavailable through other channels. The court determined that "Russell would have been powerless to 'commit' the charged offenses without the Government's pervasive intervention" (459 F.2d at 672–673). In *Knight* the court of appeals found a violation of due process where a government informant acted as a conduit in a "controlled" delivery of heroin to the defendant from an illegal source. These cases bear little relation to the facts in the present case, where the extent of the government's participation was to ask petitioner whether he had "anything going", to express continuing interest after petitioner readily gave a specific affirmative response, and to provide a willing buyer of the stolen goods—an element necessary for completion of the crime, but not even claimed to be otherwise unobtainable.

cases to the summary calendar when the court concludes that oral argument is not justified (Pet. 8–10). The court of appeals placed petitioner's case on the summary calendar only after determining that the record and submitted briefs provided a sufficient basis for an informed disposition. See, generally, *Isbell Enterprises, Inc.* v. *Citizens Casualty Co. of New York,* 431 F. 2d 409 (C.A. 5); *Payton* v. *United States,* 425 F. 2d 1324 (C.A. 5), certiorari denied, 400 U.S. 957. Petitioner had the assistance of counsel in preparing his appellate brief and was placed at no unfair disadvantage by the court's decision. We note that this Court has recently denied certiorari in other cases where it was similarly claimed that a summary disposition violated constitutional rights. See *Revel* v. *United States,* 455 F. 2d 608 (C.A. 5), certiorari denied, 407 U.S. 922; *United States* v. *Bays,* 448 F. 2d 977 (C.A. 5), certiorari denied, 405 U.S. 957.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973